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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1307

EDWARD SAMUELS,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered December 16, 1971, which affirmed a judgment of the United States District Court for the Southern District of New York convicting the petitioner, after a jury trial, for conspiracy (18 U.S.C. § 371), attempted evasion of the Interest Equalization Tax (26 U.S.C. § 7201), and aiding in and procuring the preparation of fraudulent Interest Equalization Tax returns. (26 U.S.C. § 7206[b]; 18 U.S.C. § 2)

Opinions Below

The Court of Appeals opinion, printed at pp. 29-38 of the Appendix, *infra,* is reported at 453 F.2d 805. The only other opinion was one rendered by the District Court, prior to trial, denying *inter alia* a motion to dismiss the

indictment. This opinion, dated December 29, 1967, has not been reported, and is printed in the Appendix, *infra*, pp. 17 to 28.

Jurisdiction

The judgment of the Court of Appeals was entered on December 16, 1971. Thereafter, the petitioner duly petitioned for a rehearing, which petition was denied on March 10, 1972.[1] This certiorari petition has been filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Can a defendant in a federal criminal proceeding be deemed to have waived his Sixth Amendment right to a speedy trial because he does not affirmatively demand that he be brought to trial?

2. Does a defendant in a federal criminal proceeding, as a prerequisite to invoking his constitutional right to a speedy trial, have a burden of proving actual prejudice to his defense, especially when a delay in trial embraces a period of more than four (4) years, through no fault of the defendant?

3. To what extent, if any, can prosecutorial "justification" impose upon a defendant's constitutional right to a speedy trial?

4. Can a jury be permitted to convict a defendant, in a federal criminal proceeding, under the guise of the criminal conspiracy statute, for acts done prior to the passage of a civil retroactive statute without violating the *ex post facto* clause of the Constitution?

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[1] At the same time the Circuit Court stayed the issuance of its mandate pending certiorari application to this Court.

5. Can a federal Court of Appeals, in a criminal case, constitute itself as the initial arbiter of critical issues of fact which a trial court failed to present to a jury for its determination, without violating a defendant's Sixth Amendment right to a trial by jury?

United States Constitutional Provisions Involved

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."

Article I, Section 9, Paragraph 3:

"No Bill of Attainder or ex post facto Law shall be passed."

Statement of the Case

The petitioner, Samuels, was convicted by a jury in the United States District Court for the Southern District of New York for attempting to evade and defeat payment of the federal Interest Equalization Tax (26 U.S.C. § 7201; 18 U.S.C. § 2); unlawfully aiding, assisting, procuring and advising in the preparation and presentation of false and fraudulent Interest Equalization Quarterly Tax Returns (26 U.S.C. § 7602[2]; 18 U.S.C. § 2), and conspiracy so to do. (18 U.S.C. § 371) (25A)[2]

The indictment was filed on November 29, 1966 (1A), alleging criminal activity beginning on November 1, 1963. (7A) In addition to the petitioner, the indictment named as co-defendants one Henry Scharf, William Binder and Max Blauner. Samuels, Binder and Blauner pleaded not guilty

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[2] Unless otherwise stated, all references are to Appendix before the Circuit Court of Appeals.

on December 8, 1966. (2A)[3] The other defendant, Scharf, never appeared. A warrant for his arrest was issued on December 6, 1966 (2A), his case was ultimately severed upon the government's motion (2), and the government considers him a fugitive from justice. (Government's Brief below, p. 33)

On January 20, 1967, the petitioner moved to dismiss the indictment and, *inter alia,* for a bill of particulars. (2A) On December 29, 1967, the District Court denied the motion to dismiss but granted, in part, the motion for a bill of particulars. (Decision of Cannella, D.J., Appendix, *infra,* pp. 22-23)

Thereafter, on March 27, 1968, the District Court marked the case off the trial calendar. (3A) Nothing further was done by either party, other than for the filing by the petitioner of a personal recognizance bond, until November 30, 1970, when the court scheduled the case for a January, 1971 trial, stating "No justification exists for further delay of this 1966 indictment." (4A)

As a consequence thereof, the government filed its Bill of Particulars on December 7, 1970 (4A), virtually three years after being ordered to so do by the District Court, and on December 31, 1970, the petitioner moved, prior to trial, to dismiss for failure to prosecute, in violation of his right to a speedy trial under the Sixth Amendment. (4A; 37A-41A)

The motion was denied by the District Court (Mansfield, J.), during a pre-trial proceeding on January 8, 1971, because: (1) the petitioner failed to demand, or to make any effort to obtain, a speedy trial; (2) the petitioner failed to prove prejudice, and (3) the fugitive status of the defendant, Scharf, was a sufficient reason for the government to

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[3] Binder was convicted on three counts (26A), and Blauner was convicted on the same counts as the petitioner. (24A) The Court of Appeals affirmed the convictions of all the defendants.

fail to press for a trial. (Transcript of Proceedings, January 8, 1971, pp. 42-43; see also Government's Brief below, pp. 32-33).

The denial of the motion to dismiss for failure to prosecute was reaffirmed at the commencement of the trial. (7) The trial began on January 14, 1971, more than four (4) years after the filing of the indictment.

The petitioner pressed the violation of his Sixth Amendment rights before the Circuit Court, which also rejected this contention, stating:

> "Not only did defendants fail to demand a trial, a prerequisite to any speedy trial claim in this circuit prior to July 5, 1971, see *United States* v. *Aberson,* 419 F.2d 820 (2d Cir.) *cert. denied,* 397 U.S. 1066 (1970); *United States* v. *Maxwell,* 383 F.2d 437 (2d Cir. 1967), *cert. denied,* 389 U.S. 1957 (1968), but also they have failed to show that the delay prejudiced them in any way. Obviously one of the principal reasons for the government's delay in moving for trial was the fugitive status of Henry Scharf, the principal defendant." (Opinion of Court below, Appendix, *infra,* p. 37)[4]

The Interest Equalization Tax (Pub. L. 88-563), to which the conspiracy charge and each substantive count relates, was in essence a 15% excise tax on the acquisition by a United States person of stock of certain foreign issuers acquired by the American from a foreign person.

The Tax Act was enacted on September 2, 1964, but was made retroactive to August 17, 1963 for listed securities

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[4] In its factual recitation, the Circuit Court opinion inexplicably refers to a three-year delay between indictment and trial. The record is clear that the delay embraced a period of more than four years, the indictment being filed on November 29, 1966, the motion to dismiss for failure to prosecute being made on December 31, 1970, and the trial having commenced on January 14, 1971.

and to July 19, 1963 for others. (26 U.S.C. § 4911; 1964 U.S. Code Cong. & Admin. News, 3500)[5]

It is perfectly clear from a reading of the entire indictment that the substantive counts simply represented fragments of various elements of the conspiracy count (7A-9A), and it is obvious that the gravamen of the government's entire case was embraced within Count I, the conspiracy charge.

Significantly, as set forth in its itemization of the requisite overt acts (9A-11A), the government's case against the defendants was predicated, in the main, upon events which transpired prior to September 2, 1964, the date of the enactment of the Interest Equalization Tax Act.[6]

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[5] The tax was proposed to Congress by President Kennedy on July 18, 1963, who recommended that it be made effective as of that date in order to immediately discourage American investment in foreign-issue securities. See 109 Cong. Rec. 12806-12810; 1963 U.S. Code Cong. & Admin. News, 1549-1558. The bill, incorporating most of the President's recommendations, was introduced in the House of Representatives on August 8, 1963 (28 Fed. Reg. 8426 [1963]); was reported out of the Ways & Means Committee on December 16, 1963; was first passed by the House on March 5, 1964; was reported out by the Senate Finance Committee on July 30, 1964; was passed by the Senate on August 4, 1964, and after a Conference Report, issued on August 15, 1964, the final version of the bill was passed by the House on August 18, 1964, by the Senate on August 19, 1964, and signed into law by President Johnson on its effective date, September 2, 1964. (1964 U.S. Code Cong. & Admin. News, 3478)

[6] The only criminal provision in the Act concerns the execution of a false certificate of American ownership. Thus, Section 7241 (26 U.S.C. § 7241) provides that "Any person who on or after the date of the enactment of the Interest Equalization Tax Act, wilfully executes a certificate of American ownership . . . which is known by him to be fraudulent or to be false in any material respect shall be guilty of a misdemeanor. . . ." It is clear that there was no legal requirement to execute any certificates prior to September 2, 1964, since as stated in the Historical Note following this Section (26 U.S.C.A. 7241) "On or after the date of the enactment of the Interest Equalization Tax Act, referred to in the text, means on or after the date of the enactment of Pub. L. 88-563, which was approved on Sept. 2, 1964." (See also 1964 U.S. Code Cong. & Admin. News, 3557)

Thus, of the 16 asserted overt acts, the first 12 completely pre-date the passage of the Act, and the 13th commingles a period of time both pre and post-September 2, 1964. Only the last three overt acts, 14, 15 and 16, exclusively aver post-September 2, 1964, activity, but as to these the government offered *no proof*, as it acknowledged when it specifically requested the trial court not to charge these alleged overt acts to the jury. (Government's Requests To Charge, Request No. 14, footnote)[7]

This posture of the government's case is reinforced by the trial testimony it adduced, which essentially focused on pre-September 1964 activity.

The evidence presented sharp questions of fact for the jury to resolve in respect to the involvement of Samuels, who was simply a commission man for a brokerage house, in respect to an alleged criminal scheme masterminded by the fugitive Scharf.

The record contains sufficient evidence to warrant a jury finding that the petitioner was not criminally involved with any scheme to defraud the government out of interest equalization taxes after the Interest Equalization Tax Act became law on September 2, 1964.

"For example, the testimony of the government's own witness established that in August, 1964, when Samuels learned of the imminence of the passage of the Interest Equalization Tax Act, he ceased handling any trading of foreign securities. (407)

Sometime thereafter, for a short time, Samuels handled some of the brokerage firm's foreign security trading for a Canadian brokerage house, but only after the Canadian company had been accepted as an account by the brokerage

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[7] As the government states therein, "The Government does not rely on overt acts originally numbered 1, 2, 3, 6, 14, 15 and 16 in the indictment and requests that the Court omit reference to them in its charge."

house for which Samuels worked after many conferences between the partners of the brokerage houses and their lawyers concerning in what fashion the foreign security business could legally be continued subsequent to the passage of the Interest Equalization Tax Act. (407-408, 454-455)

At the very least, therefore, Samuels was entitled to a jury deliberation and determination as to whether this post September 2, 1964 activity warranted his conviction. The jury could very well have decided that Samuels withdrew from all IET activity in August, 1964, and only renewed his involvement on the advice of the brokerage houses' lawyers and, indeed, upon the approval of the brokerage house for which he worked of the handling of the Canadian brokerage house's account.

Thus, the nature of Samuels' activities, both prior and subsequent to the passage of the IET, presented issues of fact for the jury to resolve, upon a proper charge by the trial court.

However, the trial court's charge, on both the conspiracy and substantive counts, did not prescind between pre and post September 2, 1964 elements, and the case was presented to the jury on a charge which permitted the jury to find Samuels guilty for engaging solely in activity predating the passage into law of the Interest Equalization Tax Act. (1190-1191, 1239-1240, 1245, 1195-1198, 1233)

Typical is that part of the charge in respect to the requisite overt act needed to support a conspiracy conviction. The trial court simply gave the standard charge that "The offense of conspiracy is complete when the unlawful agreement is made *and any single alleged overt act* done to further its objectives is committed by one of the alleged co-conspirators" (1244; emphasis supplied), drawing no distinction between pre and post September 2, 1964 overt acts.

In short, the court's charge was no different than if the Interest Equalization Tax Act had actually been enacted into law on July 18, 1963, the date it was recommended to Congress. It was premised on the thesis that a valid civil retroactive tax law could also serve as the basis for criminal retroactive punishment for those who chose to gamble that Congress would not act upon the President's recommendations.

Throughout the entire trial, the defendants' counsel, at every stage, challenged the Court's concept of the retroactive application of the Interest Equalization Tax Act. In their motions, requests to charge and exceptions to the court's charge, the defendants continuously pressed their contention that the court was permitting a criminal conviction to be rendered by the jury without requiring it to consider any evidence or circumstances which post-dated the passage of the Tax Act. (44-45, 48, 339-340, 792-794, 1048-1049, 1075-1076, 1255-1256, 1258; see also Samuels' Request To Charge No. 20, denied at 1071)

The Court of Appeals, in upholding the convictions, refused to treat with this issue. It chose to ignore the serious constitutional question of whether the trial court should have charged the jury as to the ex post facto ramifications inherent in the case. Instead, it reviewed the evidence *de novo,* and concluded that there was sufficient post September 2, 1964 evidence to justify Samuels' convictions, holding thereby that the ex post facto clause of the Constitution was not violated. (Appendix, *infra,* p. 34)

In doing so the Court of Appeals plainly constituted itself as the arbiter of facts which should have been presented to the jury. Its decision was not predicated upon any notion that the defendant waived his right to have the facts relating to the ex post facto issue adjudicated by the jury, nor could it have been since the defendant continuously protested the trial court's violation of his ex

post facto rights. Rather, the Court substituted itself for the jury, and whether a jury, under a proper ex post facto charge, would have rendered the same verdict is, and always will be, unknown.

REASONS FOR GRANTING THE WRIT

1. The Case Poses Similar Questions As To The Scope And Content Of The Sixth Amendment Right To A Speedy Trial Which The Court Has Agreed To Review In *Barker* v. *Wingo*.

On January 17, 1972, the Court granted certiorari in *Barker* v. *Wingo*, No. 71-5255, for the purpose of reviewing the fundamental elements of the Sixth Amendment speedy trial guarantee.[8] This action had been foreshadowed in *Dickey* v. *Florida*, 398 U.S. 30, where Justice Brennan stated in his concurring opinion that ". . . many—if not most—of the basic questions about the scope and content of the speedy trial guarantee remain to be resolved" (398 U.S. at 56), and more recently in *United States* v. *Marion*, —— U.S. ——, 92 S. Ct. 455 (decided December 20, 1971), where the Court noted that it "has interpreted the Sixth Amendment's speedy trial guarantee in only a small number of cases." (92 S.Ct. at 460, footnote 7)

The Sixth Circuit in *Barker*, and the Second Circuit in the present case, each rejected the defendants' Sixth Amendment contention because of their failure to demand a trial, and because of their further failure to show actual prejudice as a consequence of the delay.

The cases basically vary only in respect to the relative periods of offensive delay and in the reasons proffered by the government for the delay.

Thus, in *Barker* the delay embraced a period of over five years, whereas the delay in the instant case is slightly

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[8] Argument has been set for April 11, 1972.

more than four years; and the justification for the delay in *Barker* was alleged by the prosecution to be its concern that a key witness would, during this time period, have pleaded his privilege against self-incrimination, while in the present case the government successfully sought to justify the delay because of the fugitive status of a co-defendant.

However, the instant case is broader than *Barker* in at least one aspect. It asserts a claim of *actual* prejudice by virtue of the government's failure to furnish the defendant with a bill of particulars, in violation of a three-year old court order, until the eve of trial.

More significantly, since the present case concerns a federal criminal trial, unlike *Barker* which was a state trial, the Court has the opportunity to examine into whether the reach of the speedy trial clause of the Sixth Amendment is of precisely the same dimensions in a federal criminal proceeding as it is in a state criminal proceeding.[9]

Thus, *certiorari* must be granted in light of *Barker* v. *Wingo*.

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[9] For example, the Court should address itself to the effect of the constitutional requirements of the Sixth Amendment upon Rule 48(b) of the Federal Rules of Criminal Procedure, which empowers the federal court to dismiss an indictment "if there is unnecessary delay in bringing a defendant to trial", an issue which has been a continuous source of confusion. See, for example, *United States* v. *Dallago*, 311 F.Supp. 227 (E.D.N.Y. 1970). It should be noted, as well, that the Second Circuit has recently promulgated new prompt disposition rules, which it refused to retroactively apply to the present case. (Appendix, *infra*, p. 37) Hopefully, the Court's decision in *Barker*, and in the present case, will not only give direction to the federal courts in their application of Rule 48(b), but will also serve to establish definitive constitutional parameters for the establishment of administrative court-made rules in respect to the prompt disposition of criminal cases. Indeed, it may eliminate entirely the need for the increasing emergence of such rules.

2. The Case Raises Serious Issues Under The *Ex Post Facto* Clause Of The Constitution, Concerning The Application Of The Federal Conspiracy Statute To Retroactive Legislation, Which Have Never Previously Been Considered By The Court.

The petitioner contends that the trial court permitted the jury to convict him, under the guise of the criminal conspiracy statute, for acts done during the retroactive period, prior to the passage of the Interest Equalization Tax Act. The effect of this was to expose the petitioner to criminal liability for acts which, when effected, violated no law, in violation of the *ex post facto* clause of the Constitution. (Const. Art. I, Sec. 9, Par. 3)

The petitioner does not challenge the constitutionality of the IET, including its civil retroactive feature,[10] and recognizes, of course, that the conspiracy, aiding and abetting, tax evasion and false return statutes are valid, long-standing criminal statutes.

What the petitioner does challenge is the criminal retroactive *application* of these statutes by the trial court. As stated by the Supreme Court in *Thompson* v. *Utah,* 170 U.S. 343 (1898), the ex post facto rule applies to any statute "which by its necessary operation *'and in its relation to the offence,* or its consequences, alters the situation of the accused to his disadvantage.' " (170 U.S. at 351; emphasis supplied.)

Thus, it is firmly established in the classic cases (*Thompson* v. *Utah, supra; Calder* v. *Bull,* 3 U.S. 386 [1798]; *Fletcher* v. *Peck,* 10 U.S. 87 [1810]) that it is not the *form* of the law which controls the application of the ex post facto clause, but rather the substance of the activities which are sought to be retroactively proscribed under the guise of law.

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[10] The constitutionality of the Interest Equalization Tax Act, including its civil retroactive elements, was upheld by the Court of Claims in *First National Bank In Dallas* v. *United States,* 420 F. 2d 725 (Ct.Cl.1970), cert. denied 398 U.S. 950.

Accordingly, the principle has been applied to all "legislative acts no matter what their form" (*United States* v. *Lovett,* 328 U.S. 303, 315 [1946]), such as where a law in civil form has been sought to be applied in a punitive fashion (*Burgess* v. *Salmon,* 97 U.S. 381 [1878]; *Cummings* v. *Missouri,* 71 U.S. 277 [1866]; *Ex Parte Garland,* 71 U.S. 333 [1866]; *United States* v. *Lovett, supra*) or where the attempted application was sought under the guise of a rule of procedure. *Kring* v. *Missouri,* 107 U.S. 221 (1882).

The Supreme Court has never passed upon the issue of whether the conspiracy statute can be employed as a vehicle or conduit for making acts criminally illegal which, when committed, violated no substantive law.

A few lower court cases have treated with the issue (*Christianson* v. *United States,* 226 F.2d 646 [8th Cir. 1955], cert. denied 350 U.S. 994; *Parr* v. *United States,* 255 F.2d 86 [5th Cir. 1958], cert. denied 358 U.S. 824; *United States* v. *Kubacki,* 237 F.Supp. 638 [E.D.Pa. 1965]) but not in great depth.

The leading case is *Christianson, supra,* which as the present case, also involved an indictment alleging acts which both pre-dated and post-dated the passage of the substantive law to which the conspiracy attached. In evaluating to what extent conduct prior to the passage of the substantive law could be employed in the course of a criminal conspiracy prosecution, the 8th Circuit postulated that prior conduct is relevant on the issue of intent, but that (1) prior evidence of a conspiratorial agreement cannot be sufficient to convict; (2) prior evidence of the commission of overt acts cannot be sufficient to convict, and (3) prior evidence of one conspirator, though bearing on the issue of his intent, cannot serve as a basis for implicating co-conspirators.

As for conduct post-dating passage of the substantive law, *Christianson,* as well as *Parr* and *Kubacki,* stand for

the proposition that the jury must determine, as the trier of the facts, upon a proper charge from the court, whether (1) the conspiracy was thereafter adhered to and reaffirmed, and (2) that an overt act was thereafter committed in furtherance of the conspiracy.

The trial court in the present case, by refusing to acknowledge that the *ex post facto* clause had any relevancy, and in charging the jury simply that "The offense of conspiracy is complete when the unlawful agreement is made and any single alleged overt act done to further its objective is committed by one of the alleged co-conspirators" (1244), permitted the jury to return guilty verdicts without being required to consider any circumstances subsequent to the passage of the Interest Equalization Tax Act.

The error resulted in a fundamental violation of the petitioner's constitutional *ex post facto* rights since it sanctioned the use of the conspiracy statute to allow for a criminal conviction to be founded only upon acts which when performed, violated no law.

To what extent, and under what circumstances, if any, the conspiracy statute can be utilized when its attempted use possesses the inherent danger of doing violence to the *ex post facto* clause of the Constitution is an issue which merits consideration by the Court, especially in view of the Court's frequent warnings "that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957)

3. The Determination Of Critical Issues Of Fact By The Court Of Appeals In The First Instance, As A Consequence Of The Trial Court's Failure To Properly Charge The Jury, Violated The Petitioner's Sixth Amendment Right To Trial By Jury.

The Court of Appeals affirmed the petitioner's conviction because it found sufficient evidence in the record to support a finding that there was post-September 2, 1964

criminal activity. However, this was precisely the issue which should have been submitted to the jury. Since the petitioner never waived his right to have the jury pass upon this critical factual aspect of the case, the Court of Appeals, in constituting itself as the arbiter of these facts, deprived the petitioner of his Sixth Amendment right to a trial by jury.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the District Court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

66 Cr. 953

UNITED STATES OF AMERICA,

—against—

HENRY SCHARF, WILLIAM BINDER, MAX BLAUNER and EDWARD SAMUELS,

Defendants.

CANNELLA, J.

The defendant Binder's motion, pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure for dismissal of the indictment, is denied.

The defendant Binder's motion, pursuant to Rule 12 (b)(4) of the Federal Rules of Criminal Procedure for dismissal of the indictment, is denied.

The defendant Binder's motion, pursuant to Rule 6(e) and 12(b)(4) of the Federal Rules of Criminal Procedure, for court inspection of Grand Jury minutes and a hearing, is denied.

The defendant Binder's motion pursuant to Rule 16(a) of the Federal Rules of Criminal Procedure for discovery and inspection, is granted.

The defendant Binder's motion, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure for a bill of particulars, is granted as indicated.

Appendix A

The defendant Binder's motion, pursuant to Rule 16(b) and 17(c) of the Federal Rules of Criminal Procedure for discovery and inspection, is granted in part and denied in part.

The defendant Binder's motion, pursuant to Rule 14 of the Federal Rules of Criminal Procedure for a separate trial, is denied.

The defendant Binder's motion, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure for suppression of evidence illegally seized, is denied.

The defendant Binder's motion, pursuant to Rule 7(c) and 12(b)(2) of the Federal Rules of Criminal Procedure for dismissal of Count One of the indictment as duplicitous, is denied.

The defendant Samuels' motion, pursuant to Rule 12 of the Federal Rules of Criminal Procedure for dismissal of the indictment, is denied.

The defendant Samuels' motion, pursuant to Rule 16 of the Federal Rules of Criminal Procedure for discovery and inspection, is granted.

The defendant Samuels' motion, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure for a bill of particulars, is granted as indicated.

The defendant Samuels' motion, pursuant to Rule 14 of the Federal Rules of Criminal Procedure for a separate trial, is denied.

The defendant Samuels' motion, pursuant to Rule 41 of the Federal Rules of Criminal Procedure for suppression of evidence illegally seized, is denied.

On November 29, 1966 a thirteen count indictment was filed charging William Binder and Edward Samuels and two other defendants with conspiracy to violate Internal Revenue Laws and with defrauding the United States by misleading the U.S. Treasury Department, Internal Revenue Service,[1] with attempting to evade assessment and

[1] 18 U.S.C.§371.

payment of the Interest Equalization Tax,[2] and with aiding and assisting in preparation and submission of false and fraudulent Interest Equalization Tax Returns,[3] and Applications to Release Property from Federal Tax Lien.[4]

The defendant Binder has joined in one application nine separate requests for relief.[5] The defendant Samuels similarly moves for five separate forms of relief. To the extent that the applications request similar relief, they will be treated jointly.

MOTIONS FOR DISMISSAL OF INDICTMENT

The motions of defendants Binder and Samuels, pursuant to Rule 12(b)(2) of the Federal Rules of Criminal Procedure for dismissal of the indictment as being premised on an *ex post facto* law, are denied.

The defendant Binder's motion, pursuant to Rule 12 (b)(4) of the Federal Rules of Criminal Procedure for dismissal of the indictment as impermissibly transforming misdemeanor charges into charges of felonies, is denied.

Generally stated the indictment charges the defendants with participating in a fraudulent scheme designed to circumvent assessment and payment of taxes resulting from the Interest Equalization Tax Act,[6] hereinafter referred to as "IET". "IET" was enacted by Congress as an excise tax designed to aid the United States balance of payments situation. It provides for the imposition of a tax on the initial purchase of foreign issue securities by a United States citizen. The act which became law on September

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[2] 26 U.S.C.§7201 and 18 U.S.C.§2.

[3] 26 U.S.C.§7206(a) and 18 U.S.C.§2.

[4] 18 U.S.C.1001, 2.

[5] The attorneys are to be commended for the efficient consolidation of their requests.

[6] 26 U.S.C.§4911-4920, 6680, 6681 and 7241.

2, 1964 provided for retroactive tax impact for transactions occurring on or after July 19, 1963 in conformance with President Kennedy's original recommendation.[7] Exhaustive notification procedures were implemented in this connection.[8] However, the retroactivity of the Act was limited to the taxing provisions as is explained in the legislative history and provided in the Act itself.

> ". . . the criminal provision in the bill which penalizes the willful execution of false certificates is to be made applicable only to false certificates executed on or after the date of enactment of the bill. This is in conformity with the constitutional prohibition against criminal penalties applying to acts occurring before the date of enactment of the legislation involved. However, this change does not affect the applicability of the provisions in present law (sec.1001 of title 18, United States Code) which provide criminal penalties for false representations made to a department or agency of the United States on a matter within its jurisdiction . . .". 1964 U.S.Code Cong. & Admin. News, 3507.

Contrary to the allegations in the defendants' moving papers, this action is premised upon their alleged fraud and is not intended to enforce the criminal provisions of "IET". The defendants are charged with seeking to evade and escape the Interest Equalization Tax. In a recent case the Supreme Court has dealt with a similar issue and rejected the argument of unconstitutionality as a defense to a charge of fraud and deceit in circumvention of the allegedly unconstitutional law.

> "The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary,

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[7] 109 Cong.Rec.12249; 1963 U.S. Code Cong. & Admin. News, 1549-56.

[8] Affidavit of Asst. U.S. Attorney Peter E. Fleming, Jr., pp. 3, 4.

deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional." *Dennis* v. *United States,* 384 U.S. 855 at 867.

The motions are denied.

Similarly, the defendant Binder's motion pursuant to Rule 12(b)(4) of the Federal Rules of Criminal Procedure for dismissal of the indictment on the ground that the indictment improperly charges felonious conduct, is denied.

The defendants' acts would be felonious because they would have conspired to violate and would have violated federal statutes long in existence and the Congress has seen fit to make such conduct a felony. While the alleged acts include violations of the misdemeanor provisions of "IET", i.e. failure to file "IET" tax returns, the government has indicted them for conspiracy to evade assessment and payment of taxes and other felonious conduct. Only the most tortured reading of the indictment would allow contrary interpretation. If the conduct charged is proven, the defendants are indeed guilty of felonies.

The motion is denied.

Motion for court inspection and evidentiary hearing of grand jury proceedings

The defendant Binder's motion, pursuant to Rule 6(e) and 12(b)(4) of the Federal Rules of Criminal Procedure for court inspection and an evidentiary hearing of the Grand Jury Proceedings, is denied.

The defendant Binder argues that the indictment was obtained by use of evidence and procedures which were

in violation of the Constitution and laws of the United States and the constitutional rights of the defendant Binder. The government categorically denies any improper or illegal activities by the office of the United States Attorney or the Internal Revenue Service, and further alleges, in a sworn affidavit by the Assistant United States Attorney in charge of this prosecution, that none of the evidence presented to the Grand Jury was the product of illegal or unconstitutional activities.

This court is mindful of the principle of secrecy of grand jury proceedings that is deeply embedded in our criminal law,[9] and does not find that an inquiry is justified at this time.

The trial judge will be in a better position to make a judgment as to whether or not the supervisory powers of the court should be exercised.

The motion is denied without prejudice to a renewal at trial.

MOTIONS FOR A BILL OF PARTICULARS

The motions of defendants Binder and Samuels pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure for a bill of particulars, are granted.

Both Binder and Samuels move this court for separate bills of particular totalling forty-eight demands in all. In theory, the purpose of a bill of particulars is to inform the defendant of the nature of the charges against him with sufficient precision to enable him to prepare for trial, to prevent surprise or to plead his acquittal or conviction in bar of another prosecution for the same offense where the

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[9] *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958), *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52, 2 Cir. 1960.

indictment is too vague and indefinite for such purposes.[10] It is not the function of a bill of particulars, however, to enable a defendant to obtain access to purely evidentiary matters.[11] An application for a bill of particulars should not constitute "a set of interrogatories with respect to the government's evidence."[12]

The government has agreed and the court directs, that the following bill of particulars be furnished.

1. The names of any conspirators, individual or corporate, not named in the indictment.
2. The approximate date when it is claimed Binder entered the conspiracy.
3. The manner in which the defendants are alleged to have misled, the Internal Revenue Service.
4. Will produce for inspection as referred to in the indictment, all Certificates of American Ownership, all Applications for Discharge of Property from Federal Tax Lien, and all "IET" Tax Returns.

With respect to item four(4) the court orders that the defendants be permitted to a copy of all said documents.

The remainder of defendants' requests either seek information not necessary to fulfill the basic purpose of the bill of particulars, or are attempts to elicit purely evidentiary matter, and therefore are denied in their entirety.

The motions for a bill of particulars are granted, to the extent indicated.

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[10] *United States* v. *Lebron,* 222 F. 2d 531, (2 Cir.), cert. denied, 350 U.S.876(1955).

[11] *United States* v. *Lebron, supra* note 12, 222 F.2d at 535-6.

[12] *United States* v. *Fassoulis,* 179 F.Supp.645, 647 (S.D.N.Y. 1959).

Appendix A

MOTIONS FOR DISCOVERY AND INSPECTION

The defendants Binder and Samuels motions for discovery and inspection pursuant to Rule 16 and 17 are granted in part and denied in part.

Both defendants move this court for an order permitting inspection and copying of their respective testimony before the Grand Jury. The motion is granted.[13] Defendant Binder moves this court for inspection of all other statements, confessions and admissions made by him. The motion is granted.[14]

The defendants Binder and Samuels further move this court for discovery and inspection of documents identified in the indictment. The court has granted said documents as part of the bill of particulars, hence this part of the motion is moot.

The defendant Binder's further request for brokerage statements is granted upon condition that the defendant Binder furnish the government with the documentary materials 1 through 11 set forth in the government's memorandum in opposition dated April 28, 1967.[15]

The defendant Binder is under no obligation to furnish said documents. However, if he requests discovery of the brokerage statements by affidavit, they will be produced in exchange for the documents described.

The motions are granted in part and denied in part.

MOTION FOR SEPARATE TRIAL

The defendants Binder and Samuels' motions, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, for severance and a separate trial, are denied.

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[13] Fed.R.Crim.P. 16(a)(3).

[14] Fed.R.Crim.P. 16(a)(1).

[15] Fed.R.Crim.P. 16(b) and (c).

Such a motion is a matter within the sound discretion of the court.[16] Judge Palmieri in *United States* v. *Stromberg,* 22 FRD 513,524(S.D.N.Y.1957) stated: "The motions for severance on the ground of prejudicial joinder of defendants present a task of fairly balancing the prejudice to the government from separate trials against the prejudice to the defendants from a mass trial."

Both Binder and Samuels request severance from the other two defendants and from each other. They individually allege that substantial prejudice will result, denying them a fair trial if severance is not permitted. The government urges a joint trial arguing the general rule that persons jointly indicted should be jointly tried.[17] In the posture of the cases at this time the applications are denied without prejudice to renewal before the trial judge.

The motions are denied.

MOTIONS FOR SUPPRESSION OF EVIDENCE ILLEGALLY OBTAINED

The defendant Samuels' motion, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure for an order suppressing evidence obtained in violation of his constitutional rights, is denied.

The defendant urges that a study of the overt acts makes it evident that the indictment is founded on illegal evidence or the fruits thereof. In addition, the defendant relies upon certain admissions made by the Solicitor General of the United States with respect to electronic eavesdropping.[18] There is no factual connection of these admissions with this case. The cases are clear that the

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[16] *Opper* v. *United States,* 348 U.S.84(1954).

[17] *Hall* v. *United States,* 168 F.2d 161(D.C.Cir.1948), *cert. denied,* 334 U.S.853(1948).

[18] See: *Black* v. *United States,* No.1029 October Term 1965, supplemental memorandum of the United States dated July, 1966; *Shipiani* v. *United States,* No.504 October Term 1966, supplemental memorandum of United States dated November 1966; *Davis* v. *United States,* No.245, October Term, 1966.

burden of establishing illegal wiretapping or eavesdropping is on the defendant and that mere conclusory allegations without some factual support are insufficient to support a demand for a hearing. *United States* v. *Casanova*, 213 F.Supp.654(S.D.N.Y.1963). This type of motion has been characterized as ". . . nothing but a stark fishing expedition by the defendant." *United States* v. *Pardo-Bolland*, 229 F.Supp.473(S.D.N.Y.1964).

As to presently pending cases, the Department of Justice has established a committee to investigate and report whether evidence in these cases was obtained by illegal electronic means in violation of any of the defendant's constitutionally protected rights. The court has no reason to doubt that the committee will make its report. Should the investigation unearth anything favorable to the defendant's position, the court is satisfied it will be immediately made known to the court and action will be taken.

In the absence of a specific factual showing indicating the use of electronic equipment, the court finds the application to be based on pure conjecture, and is premature.

The defendant Binder's motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, for an order suppressing evidence obtained in violation of his constitutional rights, is denied.

The defendant Binder alleges that on March 24, 1966, at the premises of Dunmetal's Painting Company in Detroit, Michigan, a Secret Service Agent posing as a Fire Marshal was seen looking through records of the defendant and his company. Thereafter, it is alleged that papers were missing, said papers allegedly relate to transactions between Binder and Ray Hazael, a co-conspirator named in the indictment. Except for surmize and conjecture there is nothing to indicate that the government in this case, has or intends to use any of the papers allegedly missing, or has gained any leads from such alleged search. On the contrary, in a sworn affidavit the Assistant United States Attorney in charge of this prosecution denies any

knowledge of or association with the alleged search, and further states that none of the "fruits" of the alleged search are in the possession of the United States Attorney or will be used as evidence at the trial."[19]

It has been suggested that the court should deny a hearing on the motion to suppress except when the petition alleges facts which if proved would require relief. "An order suppressing evidence on the ground that the defendant has been the victim of an illegal search does not grant immunity from a conviction based on other evidence, or prevent the proving of the facts by other means."[20]

In view of the representations made by the United States Attorney, the motion is denied.

However, this denial is without prejudice to a renewal before the trial judge upon factual showing that evidence sought to be introduced was obtained as a result or was the product of an illegal search and seizure.

MOTION TO DISMISS COUNT ONE AS DUPLICITOUS

The defendant Binder's motion, pursuant to Rule 7(c) and 12(b)(2) of the Federal Rules of Criminal Procedure for dismissal of Count One of the indictment as duplicitous, is denied.

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[19] In the affidavit in opposition dated May 1, 1967, Assistant United States Attorney Peter E. Fleming, Jr., stated at pp. 9-10: "If Binder's business premises were searched as alleged in Mr. Greenberg's affidavit (pp.5-6), that search took place without the knowledge, authorization, or assistance of either the United States Attorney or the Internal Revenue Service, had nothing whatsoever to do with the grand jury investigation which resulted in this indictment; and produced no evidence which was presented to the Grand Jury, directly or indirectly, or which will be presented at the trial of the indictment. Indeed no one connected with instant case has ever seen, or is aware of, any "fruits" of the alleged search. In short, there is no evidence to suppress".

[20] 5 Orfield, *Criminal Practice Under the Federal Rules* § 41:54 (1967).

Appendix A

The defendant argues, ". . . by reason of the fact that said count is duplicitous and contains an attempt on the part of the United States of America to plead two separate conspiracies within the same count, contrary to the laws of the United States."[21] In aid of his argument Binder urges that ". . . the express language of §371[22] 'conspire either to commit any offense against the United States or to defraud the United States' (emphasis supplied) requires that the government elect which part of this statute it intends to apply . . .".[23]

Mr. Justice Holmes answered a similar objection in *Frohwerk* v. *United States*, 249 U.S.204 at 210, "The conspiracy is the crime, and that is one, however diverse its objects."

This circuit has upheld the validity of a similar count in an indictment.[24]

Accordingly, the defendant's motion to dismiss Count One as duplicitous, is denied.

So ordered.

Dated: New York, N.Y.
December 27, 1967.

JOHN M. CANNELLA
U.S.D.J.

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[21] Defendant Binder's Notice of Motion, February 10, 1967, pp. 5-6.

[22] 18 U.S.C.§371.

[23] Defendant Binder's Affidavit, February 10, 1967, pg. 7.

[24] *United States*. v. *Manton*, 107 F.2d 834, (2 Cir.1938), cert. denied, 309 U.S.664.

APPENDIX B

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 170, 183, 184—September Term, 1971.

(Argued October 1, 1971 Decided December 16, 1971.)

Docket Nos. 71-1434,
71-1440, 71-1810

UNITED STATES OF AMERICA,

Appellee,

—v—

WILLIAM BINDER, MAX BLAUNER and
EDWARD SAMUELS,

Appellants.

Before:

LUMBARD, MULLIGAN and OAKES,

Circuit Judges.

Appeals from judgments of conviction for conspiracy, 18 U.S.C. §371, attempted evasion of the Interest Equalization Tax, 26 U.S.C. §7201, and aiding in and procuring the preparation of fraudulent Interest Equalization Tax returns, 26 U.S.C. §7206(b); 18 U.S.C. §2, in the United States District Court for the Southern District of New York, Mansfield, *J.* and a jury.

Affirmed.

HAROLD F. MCGUIRE, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern

District of New York, and Peter F. Rient, Assistant United States Attorney, on the brief), *for Appellee.*

DANIEL H. GREENBERG, New York, N. Y., *for Appellant William Binder.*

ARTHUR HIRSCH, New York, N. Y. (Alan Scribner, on the brief), *for Appellant Max Blauner.*

FREDERIC BLOCK, Centereach, N. Y., *for Appellant Edward Samuels.*

LUMBARD, *Circuit Judge:*

William Binder, Max Blauner and Edward Samuels appeal their convictions for conspiracy and substantive offenses designed to evade payment of approximately $7 million owed under the Interest Equalization Tax (I.E.T.) on the trading of $45 million worth of foreign issue stocks in 1964 and 1965. We affirm the convictions.

The principal contention of the appellants is that their convictions are in violation of Article I, section 9 of the Constitution which provides "No Bill of Attainder or *ex post facto* law shall be passed" as the government was allowed to prove what the defendants had done prior to the passage of the statute on September 2, 1964. We find no merit in this argument.

The indictment, filed November 29, 1966, contained 13 counts, of which we need to note only eight.[1] Count 1

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1 Counts 3, 5, 7, 8 and 13 were dismissed during the trial, and, as to Binder, the court also dismissed counts 9 through 12. The jury acquitted Binder on count 2.

Judge Mansfield sentenced Blauner and Samuels to 18-month prison terms on each count, the terms to run concurrently. Binder was fined $2,000 on the conspiracy count; sentence on counts 4 and 6 was suspended and he was placed on probation for two years.

charged Henry Scharf and the three appellants with conspiracy from November 1963 to February 1965 to evade the I.E.T. and defraud the United States by filing false and fraudulent returns for the quarters ending September 30, and December 31, 1964, and March 31, 1965. 18 U.S.C. §371. Counts 2, 4 and 6 charged all defendants with attempted evasion of Scharf's I.E.T. 26 U.S.C. §7201. Counts 9 through 12 charged all defendants with aiding, procuring and counseling the preparation and presentation of false and fraudulent I.E.T. returns on November 27 and November 30, 1964, and February 1, 1965. 26 U.S.C. §7206(2); 18 U.S.C. §2. Binder was convicted on Counts 1, 4 and 6, and Blauner and Samuels on Counts 1, 2, 4, 6, 9, 10, 11 and 12. Scharf, being a fugitive, was severed from the trial.

The enactment on September 2, 1964 of the I.E.T. law, 26 U.S.C. §4911, *et seq.*, was preceded by many months of discussion in the Congress, which followed a message to Congress from President Kennedy on July 19, 1963, regarding methods of reducing the flow of capital funds from the United States. Designed to correct the flow of short-term capital from the United States, the I.E.T. law levied an excise tax of up to 15% on the acquisition of foreign-issue stock by United States citizens from non-citizens.

As soon as it became known in financial markets, about March 1964, that passage of the I.E.T. was likely, American-owned foreign stock sold to United States citizens commanded a premium over foreign-owned foreign stock sold to United States citizens because no I.E.T. would become due on the former sales. Thus, in the few months prior to the enactment of the I.E.T., an American could purchase foreign-owned foreign stock and sell it at a small profit as American-owned foreign stock. This arbitrage profit, however, was not enough to cover the

amount of the I.E.T. that would come due if the tax were passed.

To curb the capital flow while Congress was considering the legislation and to avoid arbitrage speculation, the President's original message to Congress on the I.E.T. asked that the tax be made retroactive. 109 Cong. Rec. 12,806 (Senate), 12,940 (House) (1963). When passed, the statute provided that taxes were to be imposed on all affected transactions in foreign stock which took place after July 19, 1963,[2] the date of the President's message.

In March 1964 the bill which was to become the I.E.T. passed the House of Representatives with its retroactive features intact and its likely passage through the Senate then apparent, and, at the very same time, Henry Scharf and the defendants began to deal through dummy corporations in an arbitrage scheme designed to recover for themselves the profit that an American citizen could receive by dealing in foreign stock if he was able to evade the I.E.T.

In March 1964 Weston Trading Corporation, an American corporation controlled by Scharf through Management House, Inc. began heavy trading in foreign securities. Foreign-owned foreign stock was bought by Weston and sold as American-owned foreign stock. The money for the transactions was supplied by Scharf as Weston had no assets.

In April 1964, a similar arbitrage account was opened by defendant Samuels' father, Sidney Samuels and one

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2. "[A] prospective date for the Interest Equalization Tax would have made it a fruitless—if not counterproductive exercise. . . . . Without a retroactive effective date from the time of announcement, the outflow of capital in an extremely short period of time would have been so great that Congress could not have afforded to act." Note, Setting Effective Dates for Tax Legislation: A Rule of Prospectivity, 84 Harv. L. Rev. 436, 445 (1970).

Bernard Luckman, in the name of Hondo Trading Corporation.[3] Hondo also had no assets and the money for its purchases was supplied by Luckman and Samuels. In July 1964 Scharf acquired control of Hondo.

Weston and Hondo traded in foreign-owned foreign stock until August 1964. Blauner and Samuels were customers men at Coggeshall & Hicks, a New York brokerage house, and they handled all the transactions for the two corporations. The arbitrage profits on the sales were approximately $30,000 in addition to $177,000 paid to Blauner and Samuels in the form of brokerage commissions and other expenses. Part of these commissions was kicked back to Scharf. No I.E.T. was ever paid, although the government proved I.E.T. liabilities due on the corporations' transactions amounting to nearly $7 million.

In August 1964, after a meeting among Scharf, Blauner and Samuels, the defendants stopped trading through Weston and Hondo and Blauner began looking for an American citizen living in Canada who would be willing to sign his name to documents that showed that the stock purchases were made for his account. Binder, who was a long-time Scharf associate, introduced to Scharf one William Hazael who was an American citizen living in Canada. To get Hazael to agree to sign the necessary papers, Scharf agreed to pay him $150 per week; in return Hazael signed the necessary certificates of American ownership that were presented to them. Blauner and Samuels purchased foreign-owned foreign stock with Scharf's money in Hazael's name, from September 1964 until March 1965. The profits on these sales were $263,413 of which Hazael received only $4,939. Commissions on the sales which were con-

3 Sidney Samuels was indicted as a conspirator but died prior to trial. Bernard Luckman was not indicted as he apparently was unaware of the criminal use being made of his money.

ducted by Carl Pollack, a co-worker of Samuels, amounted to $80,000, part of which Pollack kicked back to Samuels.

Although Hazael's tax returns had revealed substantial tax liabilities, no payments accompanied the returns. When the IRS moved to collect the money, Scharf told Hazael to "sit tight" and had Binder continue to pay Hazael the $150 weekly in cash. Scharf then sent Hazael an affidavit to sign which exonerated Scharf from any liability in the sale of the stocks, recited falsely that Hazael's family had an interest in local cannery, that Hazael had full knowledge of the I.E.T. and that Hazael had told Scharf that he was unaffected by the I.E.T. for which reason Scharf had undertaken to sell the stocks for him. Hazael signed the affidavit, but after thinking it over, went to the IRS with the affidavit instead of returning it to Scharf.

When Binder was summoned in July 1965 to testify before a grand jury investigating the sales, he attempted to rely on the same story as was told in the affidavit which Scharf had sent to Hazael.

We are of the view that on this evidence the convictions of the appellants do not violate the *ex post facto* clause of the Constitution.

The *ex post facto* clause erects a *per se* barrier against prosecution by the government for an act legal when done, but later made illegal. See *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798). Appellants' convictions, by contrast, are all based on acts which were illegal at the time committed.

Congress unquestionably has the power to enact a tax bill with a retroactive tax effective date. See generally Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960). Once the I.E.T. became law, the tax owed on foreign-issue stock transactions had to be paid; the filing of fraudulent returns regarding such transactions was punishable under then-

existing statutes. As the proof shows, the defendants were convicted only because they attempted to evade the tax after it became due. The evidence of the appellants' action prior to the enactment of the I.E.T. did not provide the basis for their convictions, but was admitted to prove the existence of the conspiracy and its purpose, their brazen scheme to profit from evasion of a law which would soon take effect, and the wilfulness of their evasion of the tax once the law was enacted. The convictions themselves, being based on post-September 2, 1964 acts, were constitutional.[4]

Moreover, appellants all knew at the time of their illegal acts that they were violating the I.E.T. The arbitrage trading did not begin until March 1964 when in response to the imminent passage of the I.E.T., the market recognized a differential in price between foreign-owned foreign stock and American-owned foreign stock because of the anticipated tax consequences. Only sophisticated investors could have benefitted from this spread. Appellants cannot now claim that they have been convicted for acts innocently done in ignorance of their liability under the law.

Counts 9 to 12, which charged Blauner and Samuels with aiding and counseling the preparation of fraudulent I.E.T. returns, listed the dates of these activities as November 24, 1964, November 30, 1964 and March 1, 1965. Since each of these dates was after September 2, 1964, it is apparent that Blauner's and Samuels' convictions on these counts did not violate the *ex post facto* clause.

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4 Judge Mansfield's charge was properly designed to allow the jury to consider the pre-September 2, 1964 acts of appellants as some evidence of a post-September 2, 1964 conspiracy and of the appellants' wilful evasion of the I.E.T. Appellants excepted to the charge on only one ground—that no pre-September 2, 1964 acts should have been considered by the jury in its determination of whether there was an unlawful conspiracy. This request was correctly denied by Judge Mansfield for the pre-September 2, 1964 acts were evidence both of the beginnings of the enterprise and the intent of the defendants.

Count 1 charged Binder, Blauner and Samuels with conspiracy to evade payment of the I.E.T. As our account of the proof shows, there is substantial evidence that each of the three was a participant in the conspiracy and that each had engaged in overt acts after September 2, 1964. The evidence relating to pre-September 2, 1964 acts was admissible to prove the existence and purpose of the conspiracy. Since each appellant reaffirmed his participation in the conspiracy after September 2, 1964 the convictions do not violate the *ex post facto* clause. See *Christianson* v. *United States*, 226 F.2d 646 (8th Cir. 1955), *cert. denied*, 350 U.S. 994 (1956).

Counts 2, 4 and 6 charged Binder, Blauner, and Samuels with attempted evasion of the I.E.T. The trial judge properly charged the jury that the appellants could be convicted on all counts if it found beyond a reasonable doubt that the appellants knew that the stock purchases were not for Weston's, Hondo's or Hazael's account and if the jury found that appellants had aided in the preparation of fraudulent I.E.T. returns. These are precisely the acts for which the jury convicted Blauner and Samuels on Counts 9 to 12. Since the preparation of the fraudulent returns occurred after September 2, 1964, Blauner and Samuels can have no valid *ex post facto* claim.

There is adequate proof of Binder's complicity. He found Hazael and introduced him to the other defendants. He paid Hazael's airfare to New York. Shortly thereafter he met with Scharf and Hazael in Detroit, and the jury could have found that in Binder's presence Scharf explained to Hazael what the latter was expected to do and that Hazael was there guaranteed a job for five years. From this evidence Binder must have known that Hazael, an American citizen living abroad, was to be used as a dummy for the large purchases and sales of foreign-owned foreign secu-

rities. Moreover, after Hazael learned in January 1965 of the tremendous tax liability he had unknowingly incurred, Binder began to make the payments of the $150 weekly owing to Hazael in cash. Binder's explanation to the grand jury that he had borrowed $3,000 from Hazael and was repaying it at $150 a week was such that the jury which convicted him might have concluded that his entire story was false.

The other contention of the appellants may be disposed of briefly. They argue that the delay of their trial for three years after the indictment was brought violated their sixth amendment right to speedy trial. Not only did defendants fail to demand a trial, a prerequisite to any speedy trial claim in this circuit prior to July 5, 1971,[5] see *United States* v. *Aberson*, 419 F.2d 820 (2d Cir.), *cert. denied*, 397 U.S. 1066 (1970); *United States* v. *Maxwell*, 383 F.2d 437 (2d Cir. 1967), *cert. denied*, 389 U.S. 1057 (1968), but also they have failed to show that the delay prejudiced them in any way. Obviously one of the principal reasons for the government's delay in moving for trial was the fugitive status of Henry Scharf, the principal defendant.

Samuels argues that hearsay testimony relevant to the conspiracy count was improperly admitted against him on the substantive counts. This claim also lacks merit. In *United States* v. *Branker*, 418 F.2d 378, 380 (2d Cir. 1969), we said, "[E]vidence of what they said in order to carry out the scheme was just as relevant and admissible against anyone participating in the scheme on the trial of a substantive count as it would be on the trial of a conspiracy."

Blauner contends that his grand jury testimony was improperly admitted against him at trial because he was not advised when he appeared before the grand jury that he

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5 Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (promulgated January 5, 1971, as amended May 24, 1971).

was a potential defendant. There is substantial doubt whether the government actually thought that Blauner was a prospective defendant when he was brought before the grand jury. Thus no warning at all may have been in order. See *United States* v. *Scully*, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955) ("the mere possibility that the witness may later be indicted furnishes no basis for requiring that he be advised of his rights under the Fifth Amendment when summoned to give testimony before a Grand Jury").

In any event, before he testified Blauner was given the *Miranda* warnings. If these warnings are adequate to protect a defendant in the hostile environment of custodial interrogation they are surely sufficient with a witness appearing before a grand jury of citizens to be questioned by a government attorney, with a record of the proceedings made by a stenographer. Fully warned, Blauner elected to answer questions. His testimony was properly received in evidence. *Cf. Harris* v. *New York*, 401 U.S. 222 (1971).

Affirmed.